IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-312

CORENSWET, INC.,
Petitioner

versus

AMANA REFRIGERATION, INC.
Respondent.

Motion for Leave to File Brief Amicus Curiae And Brief Amicus Curiae

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Dated: October 19, 1979

The National Franchise Association Coalition ("NFAC") hereby respectfully moves the Court for leave to file the attached brief amicus curiae in support of the petition for a writ of certiorari in the instant case. The consent of attorneys for the Petitioner has been obtained. The consent of attorneys for the Respondent was requested but refused. Letters with regard thereto have been filed with the Clerk of this Court.

NFAC is a non-profit trade association representing the interests of various franchisees. Its members include associations and individuals operating in major segments of the franchise industry.[1/] As

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1/ The association members are: American Association of Independent News Distributors, Burger Chef Operators Association, Consolidated Franchise Association [related to outlets of Dunkin' Donuts], Council of Hertz Licensees, Denny's Franchise Association, McDonald's Operators' Association, Mister Donut National Dealers Association, National Association of Independent Catalog Sales Agents [related to outlets

reported by the United States Department of Commerce, the sales of the nearly 500,000 franchise establishments in the United States employing over 4,000,000 workers are expected to approximate $300,000,000,000 in 1979.[2/] These sales are projected to account for approximately 31% of the total retail sales in the United States[3/] and in excess of 10% of the 1979 gross national product.[4/]

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of Montgomery Ward], National Association of Independent Ziebart Dealers Association, National B/R Storeowners' Association [related to outlets of Baskin-Robbins, Inc.], National Muffler Dealers Association [related to outlets of Midas International Corp.], Popeyes' Franchise Association, Seven Eleven Franchise Owners' Association, Shakey's Franchised Dealers Association, and Stuckey's Franchise Owners' Association.

2/ U.S. Department of Commerce, "Franchising In the Economy, 1977-1979," Industry and Trade Administration, January, 1979, at vi.

3/ Id., at 12.

4/ U.S. Department of Commerce, "Survey of Current Business," Current Business Statistics, August, 1979, at S-1.

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceedings on April 30, 1979, significantly and adversely affect a major national industry in which NFAC and its members have an immediate and direct interest. The Fifth Circuit has disregarded the clear dictates of certain provisions of the Uniform Commercial Code as uniformly adopted by each of the fifty states, with the result that franchisees with franchise contracts relating to the sale of goods stand to lose their business upon unilateral, arbitrary, and bad faith terminations by franchisors.

Because of its significant stake in the disposition of the petition, the

NFAC respectfully requests the Court to grant this motion for leave to file the amicus curiae brief which is attached hereto.

Respectfully submitted,

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On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Fifth Circuit

BRIEF FOR AMICUS CURIAE NATIONAL FRANCHISE ASSOCIATION COALITION

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BRIEF FOR AMICUS CURIAE NATIONAL FRANCHISE ASSOCIATION COALITION

I. INTRODUCTION

The Court of Appeals for the Fifth Circuit has ruled that provisions of the Iowa Uniform Commercial Code,[1/] whereby every contract subject thereto imposes an obligation of good faith which may not

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[1/] Iowa Code Annotated ("I.C.A."), § 554. 1101, et seq. The provisions in question have been adopted by all fifty states.

be disclaimed by agreement,[2] do not "bar unilateral arbitrary terminations of distributorship agreements."[3] The Fifth Circuit reached this conclusion even though the United States District Court for the Eastern District of Louisiana had found that the termination by Amana Refrigeration, Inc. ("Respondent") of its agreement with Corenswet, Inc. ("Petitioner") was "arbitrary and without cause," and even though the Fifth Circuit acknowledged that this finding was not clearly erroneous.[4]

The opinion of the Fifth Circuit is erroneous as a matter of law and public

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[2] § 1-102(1)(I.C.A. § 554.1102(1)). Similarly to the views of the Petitioner as set forth in the Petition at pp. 22-23, we see no inconsistency between the requirement of good faith and the provisions of § 2-309(2)(I.C.A. § 554.2309(2)) stipulating that "[w]here the contract ... is indefinite in duration, it ... may be terminated at any time by either party."

[3] Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 139 (5th Cir. 1979).

[4] Id., at 131.

policy. If the opinion of the Fifth Circuit is permitted to stand, it will have a significant and adverse impact on the interests not only of Petitioner but also of the approximately 500,000 franchisees operating in this country today.[5] Petitioner has filed a petition for a writ of certiorari to the Fifth Circuit to review its judgment and opinion. The National Franchise Association Coalition ("NFAC") seeks to file this amicus curiae brief in support of Petitioner and urges this Court to grant the petition for a writ of certiorari.

II. INTEREST OF NFAC

NFAC is a non-profit trade association whose members are individual franchisees and distributors as well as

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[5] U.S. Department of Commerce, "Franchising in the Economy 1977-79," Industry and Trade Administration, January 1979, at vi.

associations involved with a particular franchise system. The associations which belong to NFAC are:

American Association of Independent News Distributors

Burger Chef Operators Association

Consolidated Franchise Association [related to outlets of Dunkin' Donuts]

Council of Hertz Licensees

Denny's Franchisee Association

McDonald's Operators' Association

Mister Donut National Dealers Association

National Association of Independent Catalog Sales Agents [related to outlets of Montgomery Ward]

National Association of Independent Ziebart Dealers Association

National B/R Storeowners' Association [related to outlets of Baskin-Robbins]

National Muffler Dealers Association [related to Outlets of Midas International Corp.]

Popeyes' Franchise Association

Seven Eleven Franchise Owners' Association

Shakey's Franchised Dealers Association

Stuckey's Franchise Owners' Association

The franchisees associated with NFAC through individual or association membership operate in all 50 states and are generally small, family-owned businesses. The franchisors, on the other hand, are generally large and well financed corporations. Typically, the franchisee has little or no bargaining power in dealing with the franchisor.[6/]

6/ As one commentator has noted: "Most of these abuses [in the franchise industry] stem from the disparity in bargaining power which exists between the franchisor -- often a large, national concern -- and the franchisee, who is usually a small, local businessman." Note, "Franchise Terminations and Refusals to Renew: The Lanham Act and Preemption of State Regulation," 60 Iowa L. Rev. 122 (1974).

The critical issue raised by this case is whether a franchisor can terminate a franchise agreement unilaterally, arbitrarily, and in bad faith. The Fifth Circuit ruled that a franchisor has that power. This ruling, which is directly contrary to the nationwide good faith provisions of the Uniform Commercial Code, will have repercussions beyond any impact upon the particular parties involved. It will affect many franchise agreements under which NFAC members and other franchisees operate. And it will encourage abusive and non-competitive practices within the fast growing franchise industry.

Under this ruling, the years of labor and the many thousands of dollars invested by the average franchisee in his business will be further put at risk. NFAC, through the members whose interests it represents, has a significant stake in the disposition of this petition for a writ of certiorari

and accordingly makes this filing in support of the petition.

III. ARGUMENT

BAD FAITH TERMINATIONS OF FRANCHISE AGREEMENTS RELATING TO THE SALE OF GOODS, AND THE THREAT OF SUCH TERMINATIONS, INVOLVE ABUSIVE PRACTICES ON A NATIONAL SCALE AND ARE PROHIBITED BY THE UNIFORM COMMERCIAL CODE.

NFAC adopts the arguments set forth by Petitioner in its Petition and Reply. As Petitioner has shown, the Uniform Commercial Code clearly requires good faith in the termination of franchise agreements relating to the sale of goods.[7/] This

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[7/] For a discussion of some of the considerations pertaining to the relationship of Article Two of the Code and franchises, see Comments and Notes, "Article Two of the Uniform Commercial Code and Franchise Distribution Agreements," 1969 Duke Law Journal at 959-1009.

requirement in the Code is critical not only in preventing unjustified terminations, but also in preventing wrongfully threatened terminations.[8] The Code's good faith provisions are thus an essential bulwark against a host of abusive (and often anti-competitive) actions that the franchisor might otherwise impose upon the franchisee.

By threats of termination in bad faith, franchisors may coerce franchisees, fearful of losing their businesses and means of support, into engaging in acts from which they would otherwise refrain. As one commentator states:

> After the [franchise] agreement is executed, the threat of termination ... becomes an effective device by which the

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[8] For an abbreviated review of the effect of threatened terminations, see the discussion accompanying the promulgation by the Federal Trade Commission of certain disclosure rules pertaining to the franchise industry. Federal Register, Vol. 43, No. 246, Thursday, December 21, 1978, at 59663 to 59670.

> franchisor can secure compliance in onerous and often illegal marketing practices.[9]

Another commentator has emphasized:

> ... The franchisor plays on this fear [of termination] to compel the franchisee 'to adhere to practices which may be detrimental to his business -- such as directed purchases, handling only products of the franchisor, retail price maintenance, not selling to selected customers, unprofitable mandatory working hour requirements, etc.'[10]

The threat may of course become real if the franchisee fails to accede to the unjustified and arbitrary demands of the franchisor.[11]

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[9] Note, "Franchise Terminations and Refusals to Renew: The Lanham Act and Preemption of State Regulation," 60 Iowa L. Rev. 122, at 123 (1974).

[10] Comment, "Franchise Regulation: An Appraisal of Recent State Legislation," 13 B.C. Inc. & Com. L. Rev. 529, at 532 (1972).

[11] "Frequently, ... the franchisor terminates because the franchisee refused to engage in anticompetitive activity or to follow other unreasonable demands." L. Schwartz and J. Flynn, "Antitrust and Regulatory Alternatives: Free Enterprise and Economic Organization," Foundation Press, Mineola, New York, 1977, at 1142.

One area where the threat of termination has been used as a potent weapon relates to anti-trust violations. In one case, franchisors were found to have used their influence to require franchisees to purchase supplies from them at inflated prices rather than from competitive suppliers at lower prices. Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971). In another case, franchisees were terminated where they refused to deal with suppliers from which the franchisor instructed them to make purchases and which were paying rebates to the franchisor. Falls Church Bratwurstaus v. Bratwurstaus M. Corp., 354 F.Supp. 1237 (E.D. Wis. 1973). There are also cases where threatened termination was used to coerce involvement in price-fixing schemes.[12/]

12/ For example, see Simpson v. Union Oil Co., 377 U.S. 13 (1964), where a franchisee was terminated for deviating from price lists set by the franchisor.

Obviously, many of the abusive practices that may be forced upon franchisees through bad faith threats of termination are not, for one reason or another, violative of, or remedial through, the anti-trust laws.[13/] Under coercive circumstances, many threatened terminations where illegalities or other abuses are involved never come to light. The Code's good faith obligation provides first line protection against coercion and resulting abuses[14/] and it is thus essential that the franchisor's power of termination be subject to that requirement.

By its plain terms, the Uniform Commercial Code, as promulgated in whole or

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13/ "While antitrust litigation may be an effective remedy in some cases and clearly limits the exercise of termination authority to achieve anti-competitive goals, it cannot completely redress the imbalance of power in most modern franchising relationships." L. Schwartz and J. Flynn, supra, at 1142-43.

14/ "It appears that if real court supervision of the franchise relationship under

in part in every state, provides this essential, though limited, protection. Thus, Section 1-203[15] states:

> Every contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement.

And Section 1-102(3)[16] states:

> The effect of provisions of this chapter may be varied by agreement, ... except that the obligations of good faith, diligence, reasonableness and care ... may not be disclaimed by agreement....

However, rather than follow the clear language of the Code[17] and engage in the

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the Code comes, it will arise out of the good faith requirement.... Good faith defined in terms of reasonable and fair conduct could become a mighty sword to strike at the arbitrary exercise of economic power ..." Hewitt, "Termination of Dealer Franchises and the Code - Mixing Classified and Coordinated Uncertainty with Conflict," 22 Bus. Law. 1075, 1086 (1967).

15/ I.C.A. § 554.1203.

16/ I.C.A. § 554.1102(3).

17/ As noted above in footnote 1/, NFAC sees no inconsistency with § 2-309(2) of the Code.

"liberal" construction and application required by Section 1-102(1) of the Code,[18] the Fifth Circuit has seen fit to reduce even further the limited arsenal of the franchisee. Rather than recognizing an essential avenue of redress to correct an imbalance in power between franchisor and franchisee which is having nationwide consequences, the Fifth Circuit has erroneously chosen to tip the scale even further in the direction of the franchisor. The NFAC respectfully submits that such a misguided and unnecessary application of uniform national law merits full consideration by this Court.

IV. CONCLUSION

As noted by Petitioner, a franchisee often enters into a franchise agreement

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18/ I.C.A. § 554.1102(1).

with no opportunity to negotiate any of its terms. Even though the franchisee thereafter proceeds to comply in total good faith and provides start-up costs and labor, creates goodwill, and pays whatever fees may be involved, the Fifth Circuit has concluded that the end of the affair may be even more one-sided than the beginning. Indeed, under the Fifth Circuit's opinion, the franchisor may not only flex his muscles, but may do so in bad faith despite nationally promulgated statutory directions to the contrary.

The potential nationwide consequences of the Fifth Circuit ruling justify the Supreme Court in deciding to

review the judgment and opinion in the instant case.

Respectfully submitted,

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